SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 195

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITIONER'S REPLY

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A reply brief is indicated here because the government's brief is one of confession and avoidance. And this reply is addressed to the attempted avoidance.

The government does not contest our position that Jencks Act material was erroneously denied Birnbaum on the first trial, or that the Court should lay down the applicable harmless error rule in the form that we urged (Pet. pp. 11-22). Instead, the government tries to get away from the Jencks Act and appears to argue that the case presents an issue as to when testimony of a deceased witness may be admitted upon a second trial. As a make-weight, the prosecution also asserts that the Jencks Act material here—which undeniably bore importantly on the credibility of Birnbaum's principal accuser and was consequently important material for defense counsel to have had at hand for cross-examination—"had no direct bearing

on the question of whether petitioner participated in the bribery of Simon" and had only "tangential bearing" on the issues (Govt. Br. p. 10).

To deal briefly with the second contention first, we find complete unreality in the effort to separate the credibility of testimony from the testimony itself, and in the related argument, which is that only a witness' accusatory statement has a "direct" bearing on the case and that all else that tests the believability and truthfulness of the testimony is tangential, with the implication that a defendant may be properly denied cross-examination as to such testing material.

The first contention, involving the effort to deny that this case presents an important Jencks Act point, is clearly wrong. If Birnbaum was erroneously denied Jencks Act material for cross-examination of Leonhardt on the first trial, that error affected the second trial, on which the testimony was read, and it was error to admit Leonhardt's testimony. The principal purpose served by the command of the Sixth Amendment, that the defendant be confronted by the witnesses against him, is to enable his counsel to cross-examine the witnesses [*Mattox* v. *United States,* 156 U. S. 237, 242-44 (1895)].

The prior testimony of a deceased witness would be inadmissible hearsay and a violation of the Constitutional right of confrontation if, through no fault of the defendant, the witness had not been fully cross-examined on the first trial [*Pointer* v. *Texas,* 380 U.S. 400, 406-08 (1965); *Motes* v. *United States,* 178 U.S. 458, 467, 470-72 (1900); *Young* v. *Valentine,* 177 N.Y. 347, 357, 69 N.E. 643, 646 (1904); 5 *Wigmore on Evidence,* 3d ed., sec. 1390, pp. 109-12 (1940)]. Two results follow one from the other:

if cross-examination is improperly limited, the conviction upon the first trial cannot stand [*Alford* v. *United States,* 282 U.S. 687 (1931)], and if the first conviction was reversed, as here on other grounds, the testimony of the witness (as to whom there was not a full opportunity for cross-examination) is inadmissible upon the subsequent trial (*Pointer* v. *Texas* and the other authorities just cited).

There is another way of looking at the matter with the same consequence. The reason, of course, for reversing a conviction for the improper denial of Jencks Act material is that the defendant was denied the opportunity for full cross-examination that the original *Jencks* case (353 U.S. 657) and the subsequent Jencks Act entitles the defendant to [*Rosenberg* v. *United States,* 360 U.S. 367, 374-77 (1959)—Brennan, J., dissenting; *Clancy* v. *United States,* 365 U.S. 312, 316 (1961)]. If upon the first Birnbaum appeal Judge Moore had properly held that the conviction was reversible for the denial of Jencks Act material (as well as for other reasons), there can be no question that Leonhardt's testimony would have been inadmissible on the second trial after his death. There have been cases where a prosecutor has misled the court upon the second trial into making that error and the convictions on the second trial were promptly reversed [*State* v. *Halsey,* 34 N.M. 223, 225-26, 279 Pac. 945, 946-47 (1929); compare *Gill* v. *State,* 148 Texas Cr. 513, 514-15, 188 S.W. 2d 584, 585 (1945) with *Gill* v. *State,* 147 Texas Cr. 392, 393-94, 181 S.W. 2d 276, 277 (1944)]. What the government is attempting to do here is to try to take advantage of the error committed on the first appeal which we could not bring to the attention of this Court because of the reversal on other grounds. It will be appreciated, then, that

no matter how the question is viewed, whether from the standpoint of the first trial or the second, the issue is the same: was Birnbaum denied the right to full cross-examination of Leonhardt upon the first trial.[1]

The government's brief also attempts to distinguish this Court's recent decision in *Dennis*, 384 U.S. 855 (1966), which in itself is dispositive of this case. There the Court held first, that grand jury testimony of government witnesses should have been produced (by analogy to the Jencks Act) and the conviction could not stand, and second, that since one of the witnesses had died after the first trial, his testimony could not be received upon a subsequent trial, since he was no longer available for cross-examination (384 U.S. at 868, note 13). It is because the production of Jencks material (and grand jury minutes, by analogy) upon the first trial is so intimately related to the admissibility of the testimony upon the second that

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[1] At one point counsel suggests (p. 10) that Birnbaum was advantaged by the government's refusal to produce the recording on the first trial, because he received it on the second when Leonhardt was no longer available to explain his failure to bring up any of the charges against Birnbaum during the meeting that was set up at the suggestion of the FBI and while Leonhardt carried a secret tape recorder (347a, D1-3). Whether Birnbaum was advantaged or not is impossible to say unless one knows whether Leonhardt would have squirmed if the recording had been produced on the first trial and he had been confronted with it. It is obvious that the prosecutor did not think Leonhardt would carry the situation off very well, because he refused to produce the recording while Leonhardt was alive.

Moreover, as *Mattox* noted (156 U.S. at 242-44), one of the purposes served by the constitutional requirement of confrontation is that it enables a jury to observe the witnesses against the defendant as they testify. That advantage is lost whenever the testimony of a deceased witness is admitted upon a second trial, and in that event all the jury has to gauge the witness is his previous cross-examination. If anything, the lack of full cross-examination is more serious upon the second trial than it was on the first when at least the jury could observe the witness.

this Court passed so easily and naturally from the one conclusion to the other.

In its attempt to distinguish *Dennis*, the prosecution now says, first, that the grand jury testimony there related "directly" to the events upon which the witness (Mason) testified for the government, while here the Jencks Act material went only to Leonhardt's credibility (Govt. Br. p. 11). It is not true, in the first place, that the excluded material did not relate directly to testimony that Leonhardt gave in his direct examination, as we pointed out in our petition (p. 16). But even if the recorded statement that was not produced related only to Leonhardt's credibility, it would make no difference. Here Birnbaum had taken the stand against his accusers, of which the principal one was Leonhardt (Pet. p. 5-6). The issue here, as in all such cases, where the witnesses for the Government are buying their freedom, is whether the accusers or the defendant are to be believed. There is nothing "tangential" about that issue. We developed, and we will not burden the Court with repetition of, the highly significant respect in which the excluded material bore upon Leonhardt's credibility (Pet. pp. 8-9)—a point that is not denied by the government in its brief.

As everyone familiar with cross-examination knows, it is seldom that one can elicit from a witness a direct contradiction of his testimony in chief, and what a cross-examiner hopes to do is to expose the incredibility of the witness to the jury, by his evasiveness, his hesitancy, and everything else that goes to credibility. To deny a defendant the right to material which goes to a witness' credibility is to deny him the right to cross-examine. That this Court early recognized in holding that material is

"related" to a witness' direct testimony within the meaning of the Jencks Act if it goes to his credibility [*Rosenberg* v. *United States, supra*—360 U.S. at 370; also, *United States* v. *Borelli*, 336 F.2d 376, 393 (2nd Cir. 1964)].

Second, it is said that, unlike Dennis, Birnbaum was a party to the conversation that was the subject of the Jencks Act recording (Gov. Br. p. 11). How this would make any difference is not stated; so we can only surmise that it is suggested that Birnbaum's presumed recollection of a long conversation that took place two years before the trial was the "equivalent" of his having the recording with which to confront Leonhardt. The recording here ran 45 printed pages (350-95a) and its approaches absurdity to suggest that Birnbaum's recollection of such a conversation was the equivalent of having a record with which to confront Leonhardt. We have already dealt with the contention that the production of the recording on the second trial was the equivalent of having the recording available for cross-examination on the first, and with the related argument as to the summation of Birnbaum's counsel on the first trial (Pet. pp. 16-19).[1]

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[1] In advancing the contention counsel incidentally misstate the record in saying that on the second trial, Birnbaum introduced the transcript of the conversation (Govt. Br. p. 9). The facts are that the government opposed the production of the recording before the second trial, that after the district court directed its production counsel for Birnbaum had a chance to study it and unsuccessfully moved to exclude Leonhardt's testimony on the second trial. Then the government—knowing that the defense would want at least to have the transcript before the jury—offered the record itself as Government Exhibit 27 (384a). In doing that, the prosecution followed the classic tactic of trying to minimize a document that it knows the other side will want to introduce.

The prosecution devotes much of its brief to painting a black factual picture. It is always easy to do that by citing only the testimony of a defendant's accusers, whose credibility is the central issue in the case. The government also asserts, in closing its brief, that this case "turns on its own particular facts" (p. 11). On the contrary, the case raises principally the proper harmless error rule to be applied in Jencks Act cases and, more particularly, whether the *Chapman* rule should be followed. That's an important question. Moreover, there was nothing uncommon, unfortunately, in the improper refusal of Jencks Act or similar material on the first trial followed by the unavailability of the witness on the second. The same situation occurred in *Dennis*.

We also urged this Court to grant certiorari because of the improper charge given by the trial judge to the jury (Pet. pp. 3, 9-11, 22-23). In the opposing brief, counsel does not attempt to defend any of the thoroughly objectionable statements in the charge to which Chief Judge Lumbard called attention in his dissenting opinion below (A 33-39) or the one that we thought was so bad that it was enough to mention it alone in our application for certiorari (p. 10). All counsel says is that the charge must be read as a "whole" (pp. 11-12). If by that he means that other parts of the charge corrected the errors, that is not true, and if he means that the whole leaves a less bad taste than the quoted parts, that point—if it is material—

can only be determined if this Court reads the whole charge which runs 56 pages (425-80a).[1]

The petition for certiorari should be granted.

Respectfully submitted,

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[1] In our petition we observed that the prosecutor himself was so alarmed by what Judge Irving Ben Cooper said that he asked the court, before the jury retired, to correct the charge, but without avail (Pet. p. 10). Now counsel say in a footnote (p. 12) that after the verdict and upon the sentence, the prosecutor sought to withdraw and minimize the earlier and spontaneous expression of alarm at the charge. We have no doubt that he regretted that the transcript recorded that earlier expression.